



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of Ryan Morgan,
Police Sergeant (PM5170N), Winslow
Township

CSC Docket No. 2019-311

List Bypass Appeal

ISSUED: NOVEMBER 26, 2018 (SLK)

Ryan Morgan appeals the bypass of his name on the Police Sergeant (PM5170N), Winslow Township eligible list.

By way of background, on May 11, 2018 the subject list was certified (PL180618) and the appellant was listed in the first position. The appellant was bypassed and the eligible in the second position (C.R.) was appointed.

On appeal, the appellant states that his bypass on the subject certification was not based on merit. Specifically, the appellant believes that he was bypassed due to his race and his status as an active reservist in the United States Coastal Reserve. The appellant highlights that he has never been suspended during his 15-year career and asserts that he is highly qualified for the position.

In response, the appointing authority, represented by Eric J. Riso, Esq., presents that under the Rule of Three, it was within its discretion to bypass the appellant in favor of the eligible in the second position and that it is the appellant's burden to prove that its bypass was unlawful. Additionally, it states that in response to *In the Matter of Nicholas R. Foglio, Fire Fighter (M2246D), Ocean City*, 207 N.J. 38 (July 19, 2011), *N.J.A.C. 4A:4-4.8(b)4* was repealed and appointing authorities were no longer required to give a statement of reason upon the disposing of a certification as to why the appointee was selected instead of a higher ranked eligible. Therefore, it argues that it need not supply a reason for the appointing authority's bypass on appeal. Further, it argues that since the appellant has not

presented any evidence to support his claim that his race and/or active reservist status played a role in his bypass, his appeal must be dismissed. Moreover, although it reiterates its argument that it is not obligated to provide a reason for the appellant's bypass, it submits a letter from the Police Chief that states that C.R. was the most qualified candidate based on his 20 years of law enforcement experience including his time in the patrol division, his eight years as a School Resource Officer and his six years as a Detective. The Police Chief also cited C.R.'s 11 years of military service prior to his employment with the appointing authority with the rank of Staff Sergeant and his involvement with several church groups and mentoring groups for juveniles within Winslow as additional reasons for his appointment.

Although given the opportunity, the appellant has not responded to the appointed authority's stated reasons for his bypass and the appointment of C.R.

CONCLUSION

N.J.S.A. 11A:4-8, *N.J.S.A.* 11A:5-7 and *N.J.A.C.* 4A:4-4.8(a)3i allow an appointing authority to select any of the top three interested eligibles on a promotional list provided no veteran heads the list. Additionally, *N.J.A.C.* 4A:2-1.4(c) provides that the appellant has the burden of proof to show by a preponderance of the evidence that an appointing authority's decision to bypass the appellant from an eligible list was improper.

In cases of this nature, where dual motives are asserted for an employer's actions, an analysis of the competing justifications to ascertain the actual reason underlying the action is warranted. See *Jamison v. Rockaway Township Board of Education*, 242 *N.J. Super.* 436 (App. Div. 1990). In *Jamison*, *supra* at 445, the Court outlined the burden of proof necessary to establish discriminatory and/or retaliatory motivation in employment matters. Specifically, the initial burden of proof in such a case rests on the complainant who must establish discrimination or retaliation by a preponderance of the evidence. Once a *prima facie* showing has been made, the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate a legitimate non-discriminatory or non-retaliatory reason for the decision.

If the employer produces evidence to meet its burden, the complainant may still prevail if he or she shows that the proffered reasons are pretextual or that the improper reason more likely motivated the employer. Should the employee sustain this burden, he or she has established a presumption of discriminatory or retaliatory intent. The burden of proof then shifts to the employer to prove that the adverse action would have taken place regardless of the motive. In a case such as this, where the adverse action is failure to promote, the employer has the burden of

showing, by preponderating evidence, that other candidates had better qualifications than the complainant.

In the instant matter, it was within the appointing authority's discretion to select any of the top three interested eligibles for each appointment and, therefore, the appellant and C.R. were reachable for potential appointment. Nevertheless, the appellant alleges that he was bypassed for improper reasons. Specifically, the appellant contends that he was bypassed because of his race and his status as an active reservist in the United States Coastal Reserve. However, the appellant has not submitted any documentation, corroborating witnesses or other evidence that indicates that any decision regarding any treatment the appellant received was based on his race or military status. In other words, other than his mere allegations, the appellant has not presented any substantive evidence regarding his bypass that would lead the Civil Service Commission (Commission) to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the Rule of Three. See *In the Matter of Michael Cervino* (MSB, decided June 9, 2004). Additionally, the appointing authority has presented valid business reasons for bypassing the appellant, namely, that C.R. had 20 years of experience in law enforcement, 11 years in the military and his involvement in local church and mentor groups. Thus, the Commission finds that the appellant did not meet his initial burden of establishing a *prima facie* case of racial discrimination or discrimination based on military status.

One other matter needs to be addressed. The appointing authority initially argued that it did not need to supply a reason for its bypass based on the repeal of *N.J.A.C.* 4A:4-4.8(b)4. In *Jamison, supra*, the standard was set that the appointing authority must articulate a legitimate reason for a candidate's bypass after the appellant provides a *prima facie* case. Thereafter, in *Foglio, supra*, the Supreme Court of New Jersey held that, as bypassing a higher-ranked eligible is facially inconsistent with principles of merit and fitness, the appointing authority must justify its selection of a lower-ranked eligible with a specific reason. The Court viewed the appointing authority's stated reason as "boilerplate" and remanded the matter back to the Commission so that the appointing authority could supply a "proper statement of reasons" for the bypass. An appellant would then have an opportunity to make a showing before the Commission that the appointing authority's action was arbitrary. In response to *Foglio*, an amendment to *N.J.A.C.* 4A:4-4.8 was approved which deleted the requirement under paragraph (b)4 that an appointing authority needed to provide a statement of reasons for a bypass at the time of the disposition of a certification. A review of the rationale in approving this amendment indicates that this was not intended to stop the review of a candidate's bypass. Instead, it was determined that the best time for the Commission to review a bypass was when an eligible files an appeal of that action as the eligible has communicated the basis for the challenge allowing the appointing authority to then provide an explanation for the bypass. Accordingly, the appointing authority in this

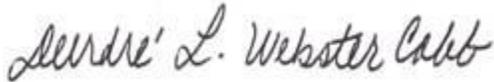
matter was still required to submit a legitimate reason for its bypass of the appellant and the only thing that has changed is the timing as to when the appointing authority was required to submit this reason. It is also noted that, should an appointing authority fail to provide a reason in the context of such an appeal, it is presumed that an appellant, with just the barest evidence, would be considered to have presented a *prima facie* case, as that evidence would be unrefuted. Accordingly, appointing authorities are cautioned to ensure that they present their legitimate reasons for the bypass of a candidate to the Commission in the context of an appeal of a bypass.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21st DAY OF NOVEMBER, 2018



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